IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.11.2007

Coram:

The Honourable Mr. Justice V. DHANAPALAN

W.P. No.38201/2004 & M.P. Nos.45727/2004 and 6127/2006

Selvam Petitioner

Vs.

1 The Director General of Police
Chennai - 600 004

2 The Inspector General of Police (L & O)
Chennai - 600 004

3 The Inspector General and Commissioner of Police
Salem City, Salem

4 The Deputy Commissioner of Police
Crime and Traffic
Salem City Police, Salem

5 The Assistant Commissioner of Police
Southern Range
Salem City Police, Salem Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of mandamus as stated therein.

For petitioner Mr. M. Ravi
For respondents Mr. A. Edwin Prabakar, Government Advocate

O R D E R

The petitioner has filed this writ petition seeking issuance of a writ of certiorarified mandamus to call for the records relating to the orders in Pro.Rc.No.131823/PR.II(2)/2004 dated 09.07.2004 of the first respondent, Pro.Rc.No.87269/AP.II(2)/2004 dated 11.06.2001 of the second respondent and Pro.c.No.Appl.14/H1/99 dated 10.03.1999 of the third respondent and PR.No.39/H1/99 dated 13.01.1999 of the fourth respondent, quash the same and to issue directions to promote him as Head Constable with retrospective effect from the date of promotion of his immediate junior with all consequential benefits.

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2. The petitioner's case, in brief, is as under:

a. The petitioner who joined as a Grade II Constable on 19.12.1988 was thereafter promoted as Grade I Constable with effect from 14.01.1999 on upgradation as per G.O. Ms.No.844. When he was serving at Kannankurichy Police Station, he was suspended by the third respondent by an order dated 29.08.1998 along with another Grade I Constable by name Devarajan on the ground that enquiry into grave charges was contemplated against them in connection with the alleged connivance with bootleggers and getting money from them and Disciplinary proceedings were also initiated against them leading to framing of the following charge by the fourth respondent:

> "Highly reprehensible conduct in having indulged in corrupt practices by collecting money as mamool from one Palanisamy, S/o Vellaya Goundar of Chettichavadi, Kannankurichi and allowed him to sell illicit arrack."

b. The fifth respondent who conducted enquiry as Enquiry Officer submitted his report to the fourth respondent giving the benefit of doubt to the petitioner and holding the charge levelled against him as "not proved". But, the fourth respondent, not concurring with the Enquiry Report, by his dissenting note, observed that there was every possibility of the witnesses having been gained over by the delinquent and turning hostile during oral enquiry. In the dissenting note, it was further observed by the fourth respondent that unlike criminal proceedings, the standard of proof in departmental enquiries has been held to be "preponderance of probabilities" and not "proof beyond reasonable doubt". The dissenting note of the fourth respondent was communicated to the petitioner on 31.12.1998 seeking his further representation in response to which the petitioner submitted a detailed reply explaining that the fourth respondent's disagreement with the well-considered findings of the Enquiry Officer is not based on evidence on record but only on inference and presumption. Still, the fourth respondent, vide his order dated 13.01.1999, imposed on the petitioner the penalty of reduction in time scale of pay by one stage for one year without cumulative effect. Challenging this order of the fourth respondent, the petitioner preferred an appeal dated 05.02.1999 before the third respondent which was rejected vide order dated 10.03.1999. Thereafter, a Review Petition came to be preferred by the petitioner before the second respondent on 17.02.2001 which was also rejected by an order dated 11.06.2001. Then was the Mercy Petition preferred by the petitioner before the first respondent on 14.06.2004 and that also did not yield any positive result to the petitioner. Hence, the present petition for the relief as stated above.

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3. On the other hand, the fourth respondent representing the other respondents, has filed counter contending that:

a. the petitioner, along with one Devarajan, other Gr.I Constable went to the house of one Palanisamy, an illicit arrack seller in Kannankurichi Police Station limits, on his own accord and asked him to come to Police Station for an enquiry and on the way, demanded and accepted Rs.450/- as bribe and after ten days, received Rs.100/- as mamool from him and allowed him to sell illicit arrack;

b. while so, the said Palanisamy, on 26.08.1998, appeared before the Asst. Commissioner of Police, Intelligence Section along with two persons viz., Ayyasamy and Rajakannu and gave statement against the petitioner based on which the latter sent a detailed report; the Assistant Commissioner of Police-North also, on 31.08.1998, made an enquiry in this matter and recorded the statements of the two persons who accompanied Palanisamy;

c. the Enquiry Report revealed that the petitioner had received illegal gratification from Palanisamy for the trade of illicit arrack and since the act of the petitioner and the other Constable amounted to reprehensible conduct, they were placed under suspension and a charge was framed against the petitioner and the Enquiry Officer, the fifth respondent has drawn the Minutes holding the charge as "not proved", while, on the contrary, the disciplinary authority, the fourth respondent analysed the Minutes and found that the witnesses turned hostile during oral enquiry and issued a show cause notice to the petitioner and after receipt of explanation from him, imposed the punishment of reduction in the time scale of pay by one stage for one year without cumulative effect on 13.01.1999;

d. P.Ws.1 to 3 had been gained over by the petitioner and had turned hostile during oral enquiry and had gone away from their earlier statements given on 26.08.1998 and 31.08.1998 before the Assistant Commissioner of Police, Intelligence Section and Assistant Commissioner of Police, North respectively which they themselves had given on their own accord and hence, no credence need be given to their depositions, more so, as there was preponderance of probability and as such, the final report dated 12.01.1999 need not be interfered with;

e. the petitioner has not exhausted the appeal remedy available to him which is still pending before the Government;

f. the Disciplinary Authority has substantiated his findings in not agreeing with the findings of the Enquiry Officer and in holding the charge as proved and as such, the ground taken by the petitioner that he has failed to substantiate the reasons assigned by him, cannot be sustained;

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g. the depositions of P.Ws. 1 to 3 do not deserve any credence and as such, the ground raised by the petitioner that their positive evidence cannot be brushed aside, does not have legs to stand;

h. when the appellate and reviewing authorities have gone through the entire episode and found that the punishment awarded was just when compared to the delinquency, the petitioner cannot take a ground that they have failed to consider the factors as contemplated in Rule 6(1) of the Tamil Nadu Police Subordinate Service (D & A) Rules, 1955 in considering the appeal and review petition;

i. the past record of the petitioner's service deserves no consideration since the delinquency was very serious which tells upon the morale of police who is expected to act against the anti-social elements;

j. the contention of the petitioner that his promotion was postponed and his juniors got their promotion deserves no consideration since it is the responsibility of the petitioner to safeguard himself and not to give room for allegations, thereby paving way for his set-back by his own mis-conduct;

k. the punishment imposed on Devarajan, the petitioner's co-delinquent was cancelled since his past record of service was clean which is not so in the case of the petitioner who was earlier punished in PR 07/2003 for having brought false allegations against the staff regarding postings to Prohibition Enforcement Wing and as such, the acts of the respondents are not violative of Articles 14 and 16 of the Constitution of India.

4. Heard Mr. M. Ravi, learned counsel for the petitioner and Mr. A. Edwin Prabhakar, learned Government Advocate for the respondents.

5. The learned counsel for the petitioner has contended that the Disciplinary Authority, the fourth respondent, has miserably failed to consider the well-considered report of the Enquiry Officer, the fifth respondent which is based on credence adduced at the time of enquiry and erred in disagreeing with the findings of the Enquiry Officer merely on the basis of sheer assumptions. He has further contended that though the standard of proof in departmental proceedings has been held to be "preponderance of probability" and not "proof beyond doubt", this principle has to be applied after the basic facts are proved and further, before inference is drawn on the basis of the abovesaid standard of proof, it has to be ensured that the primary facts and circumstances from which the inference of guilt is drawn are duly proved by oral and documentary evidence.

6. It is further contended by the learned counsel for the petitioner that the appellate and reviewing authorities have failed to consider the factors contemplated in Rule 6(1) of the Tamil Nadu Police Subordinate Service (D. & A.) Rules, 1955, in considering the appeal and review petition preferred by the petitioner. His yet another argument

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is that the act of the first respondent in cancelling the punishment of the co-delinquent and rejecting the petitioner's appeal is discriminatory and violative of Article 14 of the Constitution, particularly, when the petitioner has got blemishless past record of service.

7. Per contra, the learned Government Advocate has, at the outset, contended that when the petitioner's memorial petition to the Government has been sent to the Government by the Director General of Police, Chennai and the same is pending with the Government, the petitioner has rushed to this Court with the present petition and on this score alone, the petition is liable to be dismissed. He has further contended that when the action of the disciplinary authority in holding the charge as proved and awarding the punishment has been justified by the superiors while disposing of the appeal, review and mercy petitions, there is no need for accepting the findings of Enquiry Officer holding the charge as not proved when the charge has been well established as discussed by the disciplinary authority in his final order dated 12.01.1999.

8. Attacking the contention of the learned counsel for the petitioner that the act of the first respondent in cancelling the punishment of the co-delinquent and rejecting the petitioner's Mercy Petition is discriminatory and violative of Article 14 of the Constitution, the learned Government Advocate has contended that the co-delinquent's past record of service was good and hence, the punishment imposed on him was cancelled which is not the case with regard to the petitioner and as such, there is no discriminatory action by the respondents.

9. The learned counsel for the petitioner, in support of his contentions, has relied on the following:

a. a judgment of the Supreme Court reported in JT 2001 (Suppl.1) SC 44 in the case of State of U.P. & others vs. Raj Pal Singh: (para 1):

> "In support of the said contention, reliance is placed on the decision of this Court in B.C. Chaturvedi v. U.O.I. & Ors. [JT 1995 (8) SC 470]. Though, on principle the ratio in aforesaid cases would ordinarily apply, but in the case on hand, the High Court appears to have considered the nature of charges levelled against the 5 employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasonings given by the High Court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established to award appropriate punishment. But when the charges are the same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory."

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b. another judgment of the Supreme Court reported in AIR 1978 SC 351 in the case of Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (para 8)

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. In Gordhandas Bhanji (AIR 1952 SC 16) (at p.18):
>
> > "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to to. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> Orders are not like old wine becoming better as they grow older."

10. Further reliance has been placed by the learned counsel for the petitioner on a decision of the Supreme Court reported in (1999) 2 SCC 10 in the case of Kuldeep Singh v. Commr. of Police wherein it was held that reliance on a document which was not mentioned in the charge-sheet could not be relied on or even referred to by the Disciplinary Authority and the relevant portion reads as under:

> "39. . . . This document was not mentioned in the charge-sheet in which only two documents were proposed to be relied upon against the appellant, namely, copy of the report of SHO Lajpat Nagar dated 5-3-1990 against the appellant and the copy of the labourers' statement. This document has, therefore, to be excluded from consideration as it could not have been relied upon or even referred to by the Deputy Commissioner of Police. Moreover, according to the charge framed against the appellant, payment was made on 22.2.1990 and not on 8-2.1990 as indicated in the voucher and, therefore, the voucher for this reason also has to be excluded."

11. I have carefully considered the case of the petitioner and the respondents and also the submissions made by the learned counsel on either side and the judgments relied on by them besides perusing the material documents available before this Court.

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12. In this case, the petitioner joined as a Grade II Constable on 19.12.1988 and thereafter, he was promoted as a Grade I Constable with effect from 14.01.1999 on upgradation. While he was working at Kannankurichy Police Station, he was suspended by an order dated 29.08.1998 along with another Grade I Constable by name Devarajan on the ground that enquiry into grave charges was contemplated against them and the charge levelled against the petitioner is that his conduct was highly reprehensible in having indulged in corrupt practices by collecting money as "mamool" from one Palanisamy, S/o Vellaya Goundar of Chettichavadi, Kannankurichi and allowed him to sell illicit arrack. An enquiry was conducted and a report was submitted in which the Enquiry Officer gave the benefit of doubt to the petitioner and held the charge levelled against the petitioner as "not proved". But, the fourth respondent, the Disciplinary Authority did not accept the findings of the Enquiry Officer and took a dissenting view that there was every possibility of witnesses having been gained over by the delinquent and turned hostile, as he had reason to believe that the standard of proof in a departmental enquiry has been held to be preponderance of probabilities and not proof beyond reasonable doubt. This dissenting note of the fourth respondent was communicated to the petitioner on 31.12.1998 and the petitioner submitted his explanation based on which the fourth respondent, the Disciplinary Authority, imposed on the petitioner the penalty of reduction in time scale of pay by one stage for one year without cumulative effect vide his order dated 13.01.1999 against which an appeal was preferred by the petitioner on 05.02.1999 before the third respondent and the same was rejected on 10.03.1999. On 17.02.2001, a Review Petition came to be preferred by the petitioner before the second respondent and it was also rejected on 11.06.2001. Finally, the petitioner filed a Mercy Petition before the first respondent and that too was decided against the petitioner.

13. An analytical reading of the orders of the Disciplinary Authority, Appellate Authority, Reviewing Authority and the order passed by the first respondent in the Mercy Petition makes it clear that they have followed a routine procedure and the authorities, namely, the Appellate Authority, Revisional Authority and the first respondent who dealt with the Mercy Petition have upheld the order of the Disciplinary Authority and they have not taken efforts to go into the findings of the Enquiry Officer. In other words, their decisions are based on the order of the Disciplinary Authority alone. Further, it is to be noted that the appellate authority has to consider the appeal in the light of Rule 6(1) of the Tamil Nadu Police Subordinate Service (Discipline & Appeal) Rules, 1955 which contemplates that any error or defect in the procedure following in imposing a penalty may be disregarded by the appellate authority if such authority considers, for reasons to be recorded in writing, that the error or defect was not material and has neither caused injustice to the person concerned nor affected the decision of the case. Thus, the appellate authority has to see to that whether the facts, on which the order was based, have been established or not and there was sufficient ground for taking such action and whether the penalty is excessive, adequate or inadequate. Similarly, the Reviewing Authority shall deal with the Review in the same manner as if it were an appeal under this rule and there can be a Review more than once in respect of the same order also.

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14. A routine and systematic approach has been followed by the respondents 1 to 3. At the same time, they should have ensured whether the order of the Disciplinary Authority does have any foundation and whether his dissenting note against the findings of the Enquiry Officer substantiates his case for inflicting punishment on the delinquent. Of course, an opportunity was given to the petitioner to explain his case. Yet, the standard of proof of preponderance of probabilities has been taken into account by the Disciplinary Authority while dissenting with the findings of the Enquiry Officer. However, it is seen from the counter affidavit that the petitioner was suspended on the ground that he, along with another Grade I Constable, Devarajan, indulged in corrupt practices by conniving with bootleggers and received money from them. Accordingly, disciplinary proceedings were initiated against the petitioner as well as his co-delinquent and the petitioner was charged with highly reprehensible conduct in having indulged in corrupt practice by collecting money as "mamool". The entire procedure upto the imposition of punishment has been made by the authorities. But, it is seen that the first respondent, viz., the Director General of Police had cancelled the punishment imposed on the co-delinquent based on his clean past record and dismissed the Mercy Petition filed by the petitioner keeping in mind, the past punishment imposed on him in PR.07/2003 for having brought false allegations against the staff regarding postings to Prohibition Enforcement Wing. In this context, it would be seen that the first respondent, while dealing with the Mercy Petition, has taken into consideration, the past record of service of the petitioner and the co-delinquent. But, this can be done only when the past record of service has been included in the charge sheet. If the first respondent wants to act on the same in respect of the petitioner as well as the co-delinquent, he can only go to the order of the Disciplinary Authority and the relevant records and find out whether the past record has been included in the charge sheet. A procedural enquiry has been conducted in this case by giving an opportunity but taking explanation for the allegation of the past record has not been done.

15. It is settled proposition, as held as held by the Supreme Court in its decision reported in 1991 Supp. (1) SCC 600 in the case of Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others, that play of fairplay is to secure justice, procedural as well as substantive. The substance of the order, the effect thereof is to be looked into. Whether no misconduct spurns the action or whether the services of the petitioner is imposed with the punishment without imputation of the mis-conduct, is the test. It must be hedged with a bona fide overall consideration of the previous conduct without being tainted with either mala fide or colourable exercise of power or for extraneous considerations and such action must be done only with due care and diligence.

16. In the instant case, the first respondent has erroneously relied on the past record of the petitioner while rejecting his Mercy Petition without following the due procedure contemplated and if at all he wanted to do so, he could have done that only on finding that imputation of charges has been included in the past record of conduct, without being tainted with either mala fide or colourable exercise of

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power for extraneous considerations. Thus, the appellate authority, the reviewing authority and the first respondent who dealt with the Mercy Petition have not acted in accordance with the rules and the procedure contemplated. On the other hand, the first respondent has gone to the extent of cancelling the punishment in respect of the co-delinquent and has discriminatively rejected the petitioner's case by confirming the Disciplinary Authority's order. Hence, on this score, the order of the respondents 1 to 3 warrants interference.

17. The next point for consideration is that as to why there should be two different punishments in the cases of same charge and identical proceedings. The first respondent, while considering the Mercy Petition directly made by the petitioner's co-delinquent even without exhausting appeal/review remedy, has considered his case favourably, taking into consideration his clean past record and has rejected the petitioner's Mercy Petition on the ground that his past record was not clean. But, this can be done only by following due procedure by including the charge of imputation of misconduct in the charge sheet and this has not been taken care of by the first respondent who has discriminatively rejected the petitioner's Mercy Petition while favourably considering the Mercy Petition directly made by the petitioner's co-delinquent and that too, even without exhausting appeal and review remedy and this discriminative action of the first respondent is in violation of Article 14 of the Constitution of India.

18. Taking overall consideration of the facts and circumstances of the case and the procedure contemplated and the rules framed thereunder, it is made crystal clear that the respondents 1 to 3 have not acted in accordance with the rules and on the contrary, have acted differently and as such, there is no other option but to hold that their orders suffer from substantive and procedural irregularity and also absence of fairplay. In that view of the matter and considering the fact that the Disciplinary Authority has not taken note of the past record of the petitioner while imposing the punishment on the petitioner, the impugned orders passed by the respondents 1 to 3 alone are set aside and while doing so, this Court, at this stage remits the matter to the respondents 1 to 3 to consider the case of the petitioner afresh and pass appropriate orders within a period of twelve weeks from the date of receipt of a copy of this order.

In fine, the writ petition is allowed with the above direction. No costs. Consequently, connected W.P.M.Ps. are closed.

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To

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5 The Assistant Commissioner of Police
Southern Range
Salem City Police, Salem

+1 cc to M/s.Ravi, Advocate Sr.No.69177.

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